IADC Committee Newsletter

MEDICAL DEFENSE AND HEALTH LAW

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IN THIS ISSUE

Jeptha F. Barbour and Tyler J. Oldenburg discuss the effect of the U.S. Supreme Court's recent ruling on the enforceability of arbitration agreements for physician practices.

The Enforceability of Arbitration Agreements for Physician Practices

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The Medical Defense and Health Law Committee serves all members who represent physicians, hospitals and other healthcare providers and entities in medical malpractice actions. The Committee recently added a subcommittee for nursing home defense. Committee members publish monthly newsletters and *Journal* articles and present educational seminars for the IADC membership at large. Members also regularly present committee meeting seminars on matters of current interest, which includes open discussion and input from members at the meeting. Committee members share and exchange information regarding experts, new plaintiff theories, discovery issues and strategy at meetings and via newsletters and e-mail.
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Much of the existing case law regarding arbitration agreements in the personal injury context has involved cases against nursing homes. However, physician practices are beginning to follow suit and utilize arbitration agreements with their non-emergent patients. Many doctors are beginning to utilize arbitration agreements, which can earn them a substantial break in their liability insurance premiums, to rein in the ever increasing costs of running a physician practice. With the U.S. Supreme Court's recent decision in *Marmet Health Care Center, Inc. v. Brown*, 132 S. Ct. 1201 (Feb. 12, 2012), practitioners should feel comfortable entering into these types of agreements with their patients under the appropriate circumstances. Provided that the agreements are entered into under the appropriate circumstances and that the terms of the arbitration agreement substantially mirror your state's medical malpractice statutes or rules pertaining to damages and remedies, there should be little preventing a practitioner from enforcing the terms of his or her arbitration agreement should a patient file suit against them.

The Federal Arbitration Act

The Federal Arbitration Act (FAA), 9 U.S. § 1 *et seq.*, was enacted pursuant to the Commerce Clause of the United States Constitution by President Calvin Coolidge on February 12, 1925. Since that time, and especially recently, it has been interpreted liberally so as to support the enforcement of arbitration agreements in a wide variety of contexts. The FAA is applicable in both state and federal courts, and pursuant to the Supremacy Clause of the United States Constitution, supersedes inconsistent provisions of state law. While many states have enacted their own arbitration codes, every state statute regarding arbitration must not be inconsistent with the provisions of the FAA.

> With the above principles in mind, the FAA provides:
>
> A written provision in any . . . contract evidencing a transaction involving commerce to settle by arbitration a controversy **thereafter arising out of such contract or transaction,** or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, **shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract**.[1]

As the plain language of this section indicates, the FAA provides explicit authority for predispute arbitration agreements without placing any limitations on the contexts in which they would be enforceable.

Public Policy Prohibiting Predispute Arbitration Agreements

In *Marmet*, the U.S. Supreme Court confronted the issue of whether predispute nursing home arbitration agreements were invalid under West Virginia's public policy. The case involved three separate lawsuits brought against nursing homes in West Virginia in which the family member bringing the suit alleged that the nursing home's negligence caused their family member's death. In each case, the arbitration agreements were signed by a family member on behalf of the patient requiring nursing care.

[1] 9 U.S.C. § 2 (2012).

The Supreme Court of Appeals of West Virginia held that "as a matter of public policy under West Virginia law, an arbitration clause in a nursing home admission agreement adopted prior to an occurrence of negligence that results in a personal injury or wrongful death, shall not be enforced to compel arbitration of a dispute concerning the negligence."[2] In support of this ruling, the West Virginia court stated: "Congress did not intend for the FAA to be, in any way, applicable to personal injury or wrongful death suits that only collaterally derive from a written agreement that evidences a transaction affecting interstate commerce, particularly where the agreement involves a service that is a practical necessity for members of the public."

The U.S. Supreme Court held that the Supreme Court of Appeals of West Virginia's interpretation of the FAA was incorrect and inconsistent with prior precedent.[3] In reaffirming *AT&T Mobility LLC v. Conception*, the U.S. Supreme Court reiterated that "when state law prohibits outright arbitration of a particular type of claim, the analysis is straight forward: The conflicting rule is displaced by the FAA."[4] As the West Virginia Court found that the U.S. Congress could not have intended the FAA to apply to personal injury lawsuits that tangentially relate to a commercial contract, the U.S. Supreme Court found the West Virginia law inconsistent with the plain language of the FAA and, therefore, preempted.

While the outcome of M*armet* was not entirely a surprise given the U.S. Supreme Court's ruling in *Conception*, the ruling should serve as a big relief for those practitioners who are either utilizing arbitration agreements or wish to incorporate them into their patient documentation. The Court's reaffirmation of the principle pronounced in *Conception* indicates that, absent an act from Congress, the FAA will govern all types of claims and that no state can invalidate an arbitration agreement solely based upon public policy disfavoring arbitration of the type of claim.

Obstacles for Arbitration Agreements in the Physician-Patient Context

1. Unconscionability

Since arbitration agreements are contractual in nature, the basic elements of a contract must be present in order to be enforceable.[5] Just as with any other contract, a party can challenge the enforceability of an arbitration agreement based on state law contract defenses.[6] One of the most common defenses to enforcement of arbitration agreements in a hospital, physician's office, or nursing home is that they are unconscionable.

Although the Supreme Court in *Marmet* vacated the West Virginia Court's ruling, it reaffirmed the principle that unconscionability is a valid defense to the enforcement of an arbitration agreement. The U.S. Supreme Court noted that the West Virginia Court provided an "alternative holding" that invalidated two of the arbitration agreements on the grounds that

[2] *Brown v. Genesis Healthcare Corp.*, 228 W. Va. 646, 724 S.E.2d 250, 292 (2011).
[3] *Marmet*, 132 S. Ct. at 1202.
[4] *Marmet*, 132 S. Ct. at 1203 (*quoting Conception*, 131 S. Ct. 1740 (2010) (holding that the FAA preempts California law regarding the unconscionability of class arbitration waivers in consumer contracts)).
[5] *Seifert v. U.S. Home Corp.*, 750 So. 2d 633, 636 (Fla. 1999); *See Seabord Coast Line R.R. v. Trailer Train Co.*, 690 F.2d 1343, 1352 (11th Cir. 1982).
[6] *Gainesville Health Care Ctr., Inc. v. Weston*, 857 So. 2d 278, 283 (Fla. 1st DCA 2003).

they were unconscionable. However, the U.S. Supreme Court refused to uphold the ruling as it felt the West Virginia Court's ruling on unconscionability was, at least partially, influenced by the "invalid, categorical rule ... against predispute arbitration agreements." As such, the U.S. Supreme Court remanded the case back to the West Virginia Court to determine whether the arbitration agreements were unenforceable under West Virginia's state common law principles "that are not specific to arbitration and pre-empted by the FAA."

As unconscionability is a state law defense, it is important to consult the case law of the jurisdiction in which you practice to obtain examples where a contract has been held unconscionable and the analysis employed by the court. Generally, in order to prevail on an unconscionability claim, the plaintiff must prove both procedural and substantive unconscionability.[7] Procedural unconscionability relates to the manner that a contract is made and involves consideration of issues such as bargaining power of the parties and their ability to know and understand the disputed contract terms.[8] On the other hand, substantive unconscionability requires an assessment of whether the contract terms are so outrageously unfair as to shock the judicial conscience.[9]

a. Procedural Unconscionability

One common example practitioners and hospitals are faced with occurs when the patient is not healthy enough to shop around for their care. Consequently, an arbitration agreement will probably be enforced if the patient is healthy enough to consult another health care provider. For example, in *Frantz v. Shedden*, the patient, Shedden, sought to have a completely elective eye procedure from the defendant.[10] The physician, Dr. Frantz, gave Mr. Shedden the written arbitration agreement during their preoperative visit, which was more than a year in advance of the actual procedure. The court ruled that Mr. Shedden had a meaningful choice because the procedure was elective, as opposed to emergent, and Mr. Shedden had plenty of time to choose another physician to perform the procedure.

In determining whether an arbitration agreement was procedurally unconscionable, courts will analyze the presentation of the arbitration agreement and whether there were any time constraints during execution. As such, it is important that the arbitration agreement is drafted so that it is a separate document that is conspicuously identified as such, and that the patient had an opportunity to review the agreement and an opportunity to consult with others concerning the legal ramifications of the agreement.[11]

For example, the plaintiff in *Bland v. Health Care & Retirement Corp. of America*, Ms. Coker, alleged that the arbitration agreement she signed after checking her mother into the nursing home was procedurally unconscionable because she did not know what the agreement meant. The court noted that the arbitration agreement was presented as a separate document with no hidden terms and that Ms. Coker was not forced to assent to the agreement. Although Ms. Coker was of

[7] *See Frantz v. Shedden*, 974 So. 2d at 1196; *Orkin Exterminating Co. v. Petsch*, 872 So. 2d 259, 264-65 (Fla. 2d DCA 2004).
[8] *Petsch*, 872 So. 2d at 265.
[9] *Gainesville Health Care Ctr., Inc.*, 857 So. 2d at 284-85.
[10] 974 So. 2d at 1195.
[11] *See Bland, ex rel. Coker v. Health Care & Retirement Corp. of America*, 927 So. 2d 252, 256 (Fla. 2d DCA 2006); *Gainesville Health Care Ctr., Inc.*, 857 So. 2d at 284.

limited education, she had plenty of time to read and question the defendants about the document. As a result, the court denied the plaintiff's attempt to strike the agreement due to procedural unconscionability.

b. Substantive Unconscionability

In regards to substantive unconscionability, courts look at the terms of the contract to determine whether they are so "outrageously unfair" as to "shock the judicial conscience."[12] Arbitration under the Federal Arbitration Act is a matter of consent and, as a result, parties are generally free to structure their arbitration agreements as they see fit.[13] However, a physician practice may run into issues when the terms of their arbitration agreement alter the rights a patient may have under state specific statutes regarding the remedies available to an individual bringing a medical malpractice claim. For example, in Florida, a defendant or plaintiff may offer to arbitrate the claim. Fla. Stat. § 766.207. The applicable statute requires defendants to admit liability and proceed to arbitration to have the plaintiff's damages, which are capped differently than medical malpractice claims that are not submitted to arbitration, determined by a three member arbitration panel. Given the fairly elaborate nature of these statutes, an arbitration agreement that varies the statutory rights otherwise available to the patient, may be more prone to an attack for being substantively unconscionable.[14]

While courts will no longer be able to invalidate physician-patient arbitration agreements due to a state's public policy against predispute arbitration agreements in the personal injury context, they may still invalidate an arbitration agreement if the remedies provided by the agreement substantially diminish or circumvent the plaintiff's state statutory remedies.[15] Generally speaking, the more closely worded the terms of the arbitration agreement mirror your state's statutory medical malpractice remedies and damages, the more likely a court is to rule that the agreement was not substantively unconscionable.[16]

Conclusion

Physicians who utilize arbitration agreements in their patient intake forms stand to gain substantial breaks in their medical malpractice insurance premiums. While these agreements have been commonly utilized in nursing homes, the hospital or physician practice setting does not present any new or novel issues that would prevent these agreements from being implemented. This is especially true with the U.S. Supreme Court's ruling in *Conception* and reaffirmation in *Marmet*. It is clear that plaintiffs will be unable to attack predispute arbitration

[12] *Belcher v. Kier*, 558 So. 2d 1039, 1043 (Fla. 2d DCA 1990).

[13] *See In re Managed Care Litig. v. Blue Cross Blue Shield*, No. 00-1334, 2009 WL 855963, at *4 (S.D. Fla., March 30, 2009); *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 57 (1995).

[14] *Franks v. Bowers*, 62 So. 3d 16, 17 (Fla. 1st DCA 2011), reh'g denied (May 20, 2011*), review granted*, 74 So. 3d 1083 (Fla. 2011) (holding that, despite the differences between the subject arbitration agreement and the arbitration process in Chapter 766, Florida Statutes, the arbitration agreement did not countermand the public policy regarding arbitration in Chapter 766 because it provided meaningful relief and was consistent with the legislative purpose and public policy which led to the enactment of the subject provisions of Chapter 766).

[15] *Shotts v. OP Winter Haven, Inc.*, 86 So. 3d 456, 474 (Fla. 2011); *see also Gessa v. Manor Care of Florida, Inc.*, 86 So. 3d 484, 493 (Fla. 2011).

[16] *See Frantz*, 974 So. 2d at 1197-98 (the court concluded that since the provisions of the arbitration agreement were nearly identical to the statute governing voluntary binding arbitration of medical malpractice claims, the agreement could not possibly "shock the judicial conscience").

agreements between a physician and a patient on the grounds that public policy disfavors predispute agreements in the personal injury context. While this provides comfort to those practitioners who wish to utilize these agreements, the agreement should still be carefully drafted and presented to the patient in a reasonable manner so as to avoid claims of unconscionability.

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